

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 22, 2013

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2012AP674

Cir. Ct. No. 2011FA158

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

IN RE THE MARRIAGE OF:

JEANNE L. WARD,

PETITIONER-RESPONDENT,

V.

JODY J. WARD,

RESPONDENT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Sauk County: JAMES EVENSON, Judge. *Affirmed.*

Before Blanchard, P.J., Sherman and Kloppenburg, JJ.

¶1 PER CURIAM. Jody Ward challenges the circuit court's division of property and maintenance award following the divorce judgment and reconsideration order in this case. Jody also argues that Jeanne Ward's

reconsideration motion was untimely filed. We reject Jody's arguments and affirm.

¶2 The parties were married on June 3, 2000, and divorced effective November 8, 2011. There were no children born of the marriage. Jody is a law enforcement officer, with an earning capacity of \$77,520 annually. During most of the marriage, Jeanne operated a dog-grooming business known as "Pampered Paws," and the court found that she had an annual earning capacity of \$39,900.

¶3 The court conducted a two-day final divorce hearing and issued a written decision dated December 30, 2011. The court authorized an unequal property division in Jody's favor, and granted Jeanne \$1,200 monthly maintenance for four years. Both parties filed motions for reconsideration. The court granted Jeanne's motion, and partially denied and partially granted Jody's motion. The court modified the prior property division, left the maintenance award unchanged, and corrected a calculation error. Jody now appeals.

¶4 The division of property and the awarding of maintenance rest within the sound discretion of the circuit court. *LeMere v. LeMere*, 2003 WI 67, ¶13, 262 Wis. 2d 426, 663 N.W.2d 789. We will sustain a discretionary decision if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Liddle v. Liddle*, 140 Wis. 2d 132, 136, 410 N.W.2d 196 (Ct. App. 1987). We generally look for reasons to sustain the circuit court's findings of fact. See *Steiner v. Steiner*, 2004 WI App 169, ¶18, 276 Wis. 2d 290, 687

N.W.2d 740. We will affirm findings of fact unless they are clearly erroneous. WIS. STAT. § 805.17(2) (2011-12).¹

¶5 Jody argues that the circuit court failed to give him adequate credit for the property that he brought to the marriage, “which resulted in an inadequate award to him and a windfall to Jeanne.” An equal property division is presumed under WIS. STAT. § 767.61.² See *Preiss v. Preiss*, 2000 WI App 185, ¶10, 238 Wis. 2d 368, 617 N.W.2d 514. A court may deviate from the presumptive equal division of property after consideration of the statutory factors. See WIS. STAT. § 767.61(3).

¶6 Contrary to Jody’s argument, the court did not merely acknowledge the statutory factors in form and disregard them in substance. Rather, the court addressed at length each of the statutory factors and gave appropriate weight to factors supporting its division of property. The court specifically considered the assets brought to the marriage, and acknowledged that Jody brought significantly more to the marriage than Jeanne. However, the court found that Jody willingly chose to liquidate some of the pre-marriage assets to further the operation of Pampered Paws. The court also found that the parties were very financially active during the marriage, with various assets being bought and sold, and that many of these financial dealings were in furtherance of the marriage.

¹ All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

² WISCONSIN STAT. § 767.255 was renumbered in 2005 Wis. Act 443, § 109, to WIS. STAT. § 767.61.

¶7 The court also properly found the parties' eleven-year marriage was of moderate length.³ In addition, the court discussed the age and health of the parties, the contribution of each party to the marriage, and the parties' earning capacities, among other statutory factors. The court properly exercised its discretion in determining the division of property following a reasoned mental process applying the applicable law to the facts of record.

¶8 Jody next argues that the circuit court failed to make a finding of fair market value for Pampered Paws. He contends that "the valuation of Pampered Paws presented by Jeanne was only a calculation of value and not a conclusion as to FMV." Jody argues that Jeanne's expert's opinion was "premised on figures which do not reflect the FMV of the business assets." He also argues that the expert's opinion was outdated as he "stopped his calculation on December 31, 2010, eleven months prior to the date of the divorce."

¶9 Valuation of the marital estate lies within the sound discretion of the circuit court. *Sommerfield v. Sommerfield*, 154 Wis. 2d 840, 851, 454 N.W.2d 55 (Ct. App. 1990). Moreover, the weight and credibility to be given to the opinions of expert witnesses are uniquely within the province of the fact-finder, in this instance, the circuit court. *See Schorer v. Schorer*, 177 Wis. 2d 387, 396-97, 501 N.W.2d 916 (Ct. App. 1993).

³ Jody argues that the circuit court "failed to consider that Jeanne and Jody had been separated for at least two years before the divorce action was filed," and further that the parties had previously filed for divorce but subsequently reconciled. Jody argues that the marriage was "actually closer to a short term marriage," given the history of the parties' relationship. We reject this argument. The court specifically acknowledged the parties' separation at the outset of its decision, and noted that the parties "worked together regarding their business and financial affairs" during the separation. Jody fails to present us with a sufficient reason to upset the circuit court's conclusion that, despite living apart for the last two years before the divorce, the marriage was "of moderate length" and "[a] lot of activity went on during the course of the marriage."

¶10 The testimony of Jeanne’s valuation expert, Dennis Kleinheinz, was sufficient to support the circuit court’s valuation of Pampered Paws. The first sentence of Kleinheinz’s report identified his valuation objective: “to provide an independent calculation of the Fair Market Value of Pampered Paws Pet Resort, LLC (‘the Company’) as of December 31, 2010.”

¶11 The circuit court devoted several pages of its decision to discussing the reasons it concluded that Kleinheinz’s opinion accurately set forth the value of the business. The court stated in part:

Both evaluators used many of the same numbers and starting points for their valuations. The business history, however, does not support some of the conclusions and adjustments reached by [Jody’s expert]. Significantly, his calculations fail to take into account the total value of services provided by Ms. Ward.... Taking into account all of the factors used by both parties, the court is satisfied that [Jody’s expert] has overestimated the value of the business and what an independent investor would pay. The Kleinheinz value and supporting methodology more accurately reflects the current value of the business and his valuation of \$47,000 thus given greater weight and is accepted.

¶12 In divorce actions, circuit courts are not required to accept any one method of valuation over another. *Schorer*, 177 Wis. 2d at 399. Kleinheinz testified that in his opinion the calculation of value was the appropriate approach for a business of this type. The court was persuaded that this methodology produced a reliable valuation of the fair market value of Pampered Paws. We cannot say it was clearly erroneous for the court to rely on Kleinheinz’s opinion. *See id.* at 396. As to the timing issue, Kleinheinz testified that his valuation was based on a capitalization of five years of Pampered Paws earnings, which is typical. When he interviewed Jeanne in June or July 2011, she informed him that 2011 was shaping up to be very similar to 2010. Accordingly, it is reasonable to

infer that 2011 financial information would not have materially changed Kleinheinz's valuation.

¶13 Jody next argues that the circuit court improperly excluded potentially significant sources of Jeanne's income in calculating maintenance. He contends that as owner of Pampered Paws she could establish her own income through draws. Jody also argues that the court failed to account for the fact that the Pampered Paws real estate was owned by the parties and leased to Pampered Paws Pet Resort, LLC. He takes the position that, because the court awarded the Pampered Paws real estate to Jeanne, she became the beneficiary of the rental income from the business, and she could "raise that rent thus providing her with greater income." Jody also argues that the court "neglected to consider" that Jeanne unreasonably neglected to rent out certain space at the Pampered Paws property.

¶14 We disagree with the proposition that the circuit court improperly excluded potential income to Jeanne. The circuit court found that the amount of money Jeanne could draw from the business going forward would depend on the business's income, which the court determined was difficult to predict given the economic uncertainties at the time. The court recognized that Jeanne could seek to increase her future income, either from Pampered Paws or by renting out real estate. But, the court also noted uncertainty as to whether Jeanne could actually realize any increased income, and how long it might take her to do so. The court appropriately balanced these factors by limiting its maintenance award to four years, reasoning that while Jeanne had a "substantial opportunity" to increase her income, current economic conditions could delay her ability to do so. By limiting the maintenance award to four years, the circuit court gave Jeanne an incentive to

increase her income, and we have no reason to conclude that the court misapplied the law or made any clearly erroneous factual determinations in this context.

¶15 Jody also argues that the circuit court erred by failing to consider as income to Jeanne the interest that accrued on Jody's equalization obligation. The court ordered Jody to pay the equalization payment on a twenty-year amortization, with a balloon payment after five years, and awarded interest calculated at two percentage points above the prime rate at the end of each year. Jody's argument fails to recognize the purpose of these interest payments, which simply acknowledged the benefit to Jody of his being allowed to make the payments over a long time frame.

¶16 The accrued interest compensates the recipient spouse for interest earned on the property division during the installment period, which is a form of compensation that circuit courts are obligated to award unless present value is considered or an adequate explanation is given for doing otherwise. *See Overson v. Overson*, 125 Wis. 2d 13, 16-17, 370 N.W.2d 796 (Ct. App. 1985). That is, the equalization payment recognizes established assets awarded to Jody, from which interest would be derived. By virtue of that ownership, Jody enjoys the income opportunity lost to Jeanne, at least during the installment period. The court correctly observed that Jody could avoid payment of the interest by simply prepaying the installments, without penalty.

¶17 Finally, Jody argues that Jeanne's motion for reconsideration was untimely under WIS. STAT. § 805.17(3) and therefore could not be considered by the circuit court. Jeanne's motion concerned a math error in the divorce judgment, which Jody does not dispute was merely a miscalculation that had the effect of significantly understating the value of Jody's retirement account. The details of

the error are not contested. The court recognized and corrected this error at the reconsideration hearing.

¶18 The general time period for the filing of motions for reconsideration of judgments issued after court trials is found in WIS. STAT. § 805.17(3), which provides in part: “Upon its own motion or the motion of a party *made not later than 20 days after entry of judgment*, the court may amend its findings or conclusions or make additional findings or conclusions and may amend the judgment accordingly.” (Emphasis added.)

¶19 Jeanne’s motion was filed on March 22, 2012, more than twenty days after the filing of the divorce judgment which was entered on February 17, 2012.

¶20 Jeanne has two responses. First, she argues that the circuit court’s decision to act on the reconsideration motion was only a “technical” violation of WIS. STAT. § 805.17(3) and harmless, as there was no prejudice to Jody. Second, Jeanne argues that the court made a factual mistake in the judgment that the court could recognize and correct under WIS. STAT. § 806.07, and for this proposition she cites *Estate of Smith*, 82 Wis. 2d 667, 676-77, 264 N.W.2d 239 (1978).

¶21 We need not engage in a harmless error analysis. Jody does not attempt to address *Estate of Smith*. There, the court expressly held that the circuit court was authorized under WIS. STAT. § 806.07(1)(h) to reconsider its initial findings of fact, conclusions of law, and judgment in order to correct “mere error by the trial court,” even though the time for acting under WIS. STAT. § 805.17(3)

had expired.⁴ *Id.* at 672-73, 676-77; *see also* § 806.07(1)(a). Arguments not refuted are deemed conceded. *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ We note that our supreme court in *Estate of Smith*, 82 Wis. 2d 667, 264 N.W.2d 239 (1978), addressed an earlier version of WIS. STAT. § 805.17(3), which had a ten-day and not a twenty-day time limit. However, that difference is not pertinent on the facts of this case.

